RETURN

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To an ADDRESS of the HOUSE OF COMMONS, dated the 14th March, 1892;—For a copy of the judgment of the Supreme Court in the appeal case of Barrett *vs.* the City of Winnipeg, commonly known as the "Manitoba School case."

By order.

J. C. PATTERSON,
Secretary of State.

OTTAWA, 17th March, 1892.

IN THE SUPREME COURT OF CANADA.

WEDNESDAY, the twenty-eighth day of October, A.D. 1891.

PRESENT:

The Honourable Sir WILLIAM JOHNSTONE RITCHIE, Knight, Chief Justice,
do Mr. Justice STRONG,
do Mr. Justice FOURNIER,
do Mr. Justice TASCHEREAU,
do Mr. Justice PATTERSON.

In the matter of an application to quash by-laws 480 and 483 of the city of Winnipeg.

Between

JOHN KELLY BARRETT,
(*Applicant*) *Appellant;*

And

THE CITY OF WINNIPEG,
Respondents.

The appeal of the above-named appellant from the order of the court of queen's bench for the province of Manitoba in banc pronounced on the second day of February in the year of our Lord one thousand eight hundred and ninety-one, affirming the order of Mr. Justice Killam made in this matter the twenty-fourth day of November in the year of our Lord one thousand eight hundred and ninety, dismissing with costs the summons to quash by-laws 480 and 483 of the city of Winnipeg, granted herein on the seventh day of October, in the year of our Lord one thousand eight hundred and ninety, having come on for hearing on the twenty-seventh and twenty-ninth days of May in the year of our Lord one thousand eight hundred and ninety-one, before this court, in the presence of counsel as well for the appellant as for the respondents, whereupon and upon hearing what was alleged by counsel aforesaid this court was pleased to direct that the said appeal should stand over for judgment, and the same coming on this day for judgment, this court did order and adjudge that the said appeal should be and the same was allowed, and that the said orders of the court of queen's bench for the province of Manitoba in banc and of Mr. Justice Killam should be and the same were respectively set aside

and reversed, and that the said by-laws of the city of Winnipeg, numbered 480 and 483 should be and the same were quashed.

And this court did further order and adjudge that the said respondents should and do pay to the said appellant his costs incurred as well in the said court of Queen's bench for the province of Manitoba as in this court.

JUDGMENTS.

Sir W. J. Ritchie, C.J.

This is an application to quash two by-laws of the municipal corporation of the city of Winnipeg, which were passed for levying a rate for municipal and school purposes in that city for the year 1890, and they assess all real and personal property in the city for such purpose. It is asked that these by-laws be quashed for illegality on the following, among other grounds: That because by the said by-laws the amounts to be levied for school purposes for the protestant and Roman catholic schools are united, and one rate levied upon protestants and Roman catholics alike for the whole sum.

The state of education in Manitoba, and the relation of the catholic church in connection therewith is thus shown by the affidavit of Archbishop Taché, which is in no way contradicted. He says:—

"I, Alexander Taché, of the town of St. Boniface, in the county of Selkirk and province of Manitoba, archbishop of the Roman catholic ecclesiastical province of St. Boniface, make oath and say:

"1. That I have been a resident continuously of that country since eighteen hundred and forty-five as a priest in the Roman catholic church, and as bishop thereof since the year eighteen hundred and fifty, and now am the archbishop and metropolitan of the said church, and who is personally aware of the truth of the matters he alleges.

"2. Prior to the passage of the act of the dominion of Canada passed in the thirty-third year of the reign of her majesty queen Victoria, chapter three, known as the Manitoba Act and prior to the order in council issued in pursuance thereof, there existed in the territory now constituting the province of Manitoba a number of effective schools for children.

"3. These schools were denominational schools, some of them being regulated and controlled by the Roman catholic church, and others by various protestant denominations.

"4. The means necessary for the support of the Roman catholic schools were supplied to some extent by school fees paid by some of the parents of the children who attended the schools and the rest was paid out of the funds of the church, contributed by its members.

"5. During the period referred to, Roman catholics had no interest in or control over the schools of the protestant denominations and the members of the protestant denominations had no interest in or control over the schools of Roman catholics. There were no public schools in the sense of state schools. The members of the Roman catholic church supported the schools of their own church for the benefit of Roman catholic children, and were not under obligation to and did not contribute to the support of any other schools.

"6. In the matter of education, therefore, during the period referred to, Roman catholics were as a matter of custom and practice separate from the rest of the community, and their schools were all conducted according to the distinctive views and beliefs of Roman catholics as herein set forth.

"7. Roman catholic schools have always formed an integral part of the work of the Roman catholic church. That church has always considered the education of the children of Roman catholic parents as coming peculiarly within its jurisdiction. The school in the view of the Roman catholic is in a large measure the "children's church," and wholly incomplete and largely abortive if religious exercises be excluded from it. The church has always insisted upon its children

receiving their education in schools conducted under the supervision of the church, and upon them being trained in the doctrines and faith of the church. In education the Roman catholic church attaches very great importance to the spiritual culture of the child, and regards all education unaccompanied by instruction in its religious aspects as possibly detrimental and not beneficial to children. With this regard the church requires that all teachers of children shall not only be members of the church, but shall be thoroughly imbued with its principles and faith; shall recognize its spiritual authority and conform to its directions. It also requires that such books be used in the schools, with regard to certain subjects, as shall combine religious instruction with these subjects, and this applies peculiarly to all history and philosophy.

"8. The church regards the schools provided for by 'The Public Schools Act,' and being chapter 38 of the statutes passed in the reign of her majesty queen Victoria, in the fifty-third year of her reign, as unfit for the purpose of educating their children, and the children of Roman catholic parents will not attend such schools. Rather than countenance such schools, Roman catholics will revert to the system of operation previous to the Manitoba Act, and will establish, support and maintain schools in accordance with their principles and faith as aforementioned.

"10. The effect of 'The Public Schools Act' will be to establish public schools in every part of Manitoba where the population is sufficient for the purpose of a school, and to supply in this manner education to children free of charge to them or their parents further than their share, in common with other members of the community, of the amounts levied under and by virtue of the provisions contained in the act.

"11. In case Roman catholics revert to the system in operation previous to the Manitoba Act, they will be brought in direct competition with the said public schools. Owing to the fact that the public schools will be maintained at public expense, and the Roman catholic schools by school fees and private subscription, the latter will labour under serious disadvantage. They will be unable to afford inducements and benefits to children to attend such schools equal to those afforded by public schools, although they would be perfectly able to compete with any or all schools unaided by law-enforced support.

"12. When in the foregoing paragraphs I speak of the faith or belief of the Roman catholic church, I speak not only for myself and the church in its corporate capacity, but for its members."

It must be assumed that in legislating with reference to a constitution for Manitoba, the Dominion parliament were well acquainted with the conditions of the country to which they were about to give a constitution; and they must have known full well that at that time there were no schools established by law, religious or secular, public or sectarian. In such a state of affairs, and having reference to the condition of the population, and the deep interest felt and strong opinions entertained on the subject of separate schools, it cannot be supposed that the legislature had not its attention more particularly directed to the educational institutions of Manitoba, and more especially to the schools then in practical operation, their constitution, their mode of support, and peculiar character in matters of religious instruction. To have overlooked considerations of this kind is to impute to parliament a degree of short-sightedness and indifference, which in view of the discussions relating to separate schools which had taken place in the older provinces or some of them, and to the extreme vigilance with which educational questions are scanned and the importance attached to them, more particularly by the catholic church, as testified to by Monseigneur Taché, cannot, to my mind, be for a moment entertained. Read in the light of considerations such as these, must we not conclude that the legislature well weighed its language, and intended that every word it used should have force and effect?

The British North America Act confers on the local legislature the exclusive power to make laws in relation to education, provided nothing in such laws shall prejudicially affect any right or privilege with respect to denominational schools,

which any class of persons had by law in the province at the union; but the Manitoba Act goes much farther and declares, that nothing in such law shall prejudicially affect any right or privilege with respect to denominational schools, which any class of persons had by law or practice in the province at the union. We are now practically asked to reject the words "or practice" and construe the statute as if they had not been used, and to read this restrictive clause out of the statute as being inapplicable to the existing state of things in Manitoba at the union, whereas on the contrary, I think, by the insertion of the words "or practice," it was made practically applicable to the condition at that time of the educational institutions, which were, unquestionably and solely, as the evidence shows, of a denominational character. It is clear as at the time of the passing of the Manitoba Act no class of persons had by law any rights or privileges secured to them, so if we reject the words "or practice" as meaningless or inoperative we shall be practically expunging the whole of the restrictive clause from the statute. I know of no rule of construction to justify such a proceeding unless the clause is wholly unintelligible or incapable of any reasonable construction. The words used in my opinion are of no doubtful import but are, on the contrary, plain, certain and unambiguous and must be read in their ordinary grammatical sense. Effect should be given to all the words of a statute, nothing adding thereto, nothing diminishing therefrom, as was said by Tindall, C.J., in *Everett* v. *Wells*, 2 Scott N.S. 531. The legislature must be understood to mean what it has plainly expressed and this excludes construction.

It is a settled canon of construction that no clause, sentence or word shall be construed superfluous, void or insignificant, if it can be prevented.

While it is quite clear that at the time of the passing of this act, there were no denominational or other schools established and recognised by law, it is equally clear that there was at that time in actual operation or practice a system of denominational schools in Manitoba well established and the *de facto* rights and privileges of which were enjoyed by a large class of persons. What then was there more reasonable than that the legislature should protect and preserve to such class of persons those rights and privileges they enjoyed in practice, though not theretofore secured to them by law, but which the Dominion parliament appears to have deemed it just should not, after the coming into operation of the new provincial constitution be prejudicially affected by the action of the local legislature?

I quite agree with the cases cited by the learned chief justice of Manitoba as to the rules by which the act should be construed. I agree that the court must look not only at the words of the statute but at the cause of making it, to ascertain the intent. When we find the parliament of Canada altering and adding to the language of the British North America Act, by inserting a limitation not in the British North America Act, must we not conclude that it was done advisedly? What absurdity, inconsistency, injustice or contradiction is there in giving the words "or practice" a literal construction, more especially (as I have endeavoured to show) as the literal meaning is the only meaning the words are capable of and is entirely consistent with the manifest intention of the legislature, namely, to meet the exigencies of the country, and cover denominational schools of the class practically in use and operation? If the literal meaning is not to prevail, I have yet to hear what other meaning is to be attached to the words "or practice." If the legislature intended to protect the classes of persons who had founded and were carrying on denominational schools of the character of those which existed at the passing of the act, I am at a loss to know what other words they could more aptly have used. They might it is true have said "which any class of persons has by law or usage" but the words "practice" and "usage" are synonymous. I agree, also, that we should ascertain what the language of the legislature means, in other words, to suppose that parliament meant what parliament has clearly said.

It cannot be said that the words used do not harmonize with the subject of the enactment, and the object which I think the legislature had in view. If the legislature intended to recognize denominational schools, how could they, as I have said, have used more expressive words to indicate their intention since the words used,

read in their ordinary grammatical sense, admit of but one meaning, and therefore one construction, and we should not speculate on the intention of the legislature, that intention being clearly indicated by the language used, in view of the condition, and the state of education in that country, the object the legislature must have had in view in using them, was clearly to protect the rights and privileges with respect to denominational schools, which any class of persons had by law *or practice*, that is to say, had by usage, at the time of the union. I cannot read the language of the act in any other sense.

The decision of the court in the case of *ex parte* Renaud, 1 Pugsley 273, referred to in the court below has no application in this case. That case turned entirely on the fact that the Parish School Act of New Brunswick, 21 Vic., ch. 9, conferred no legal rights on any class of persons with respect to denominational schools. It was then simply determined that there were no legal rights with respect to denominational schools, and therefore no rights protected by the British North America Act; a very different case from that we are now called on to determine. It may very well be that in view of the wording of the British North America Act and the peculiar state of educational matters in Manitoba, the Dominion parliament determined to enlarge the scope of the British North America Act and protect not only denominational schools established by law but those existing in practice, for as I am reported to have said, and no doubt did say, in *ex parte* Renaud, that in that case "we must look to the law as it was at the time of the union, and by that and that alone be governed"; now on the other hand in this case, we must look to the practice with reference to the denominational schools as it existed at the time of the passing of the Manitoba Act.

That this was the view taken by the legislature of Manitoba would seem to be indicated by the legislation of that province, up to the passing of the Public School Act, which very clearly recognized denominational schools and made provision for their maintenance and support, providing that support for protestant schools should be taxed on protestants, and for catholic schools should be taxed on catholics, and conferring the management and control of protestant schools on protestants and the like management and control of catholic schools on catholics. This denominational system was most effectually wiped out by the Public Schools Act and not a vestige of the denominational character left in the school system of Manitoba. Mr. Justice Dubuc gives an accurate synopsis of the legislation as follows:—

The provisions of the law in regard to schools made applicable to Manitoba at the Union, were the 93rd section of The British North America Act, and the 22nd section of the Manitoba Act.

Under the said provisions of our constitution the provincial legislature, at its first session, in 1871, passed an "Act to establish a system of education in this Province." By the said act the lieutenant governor in council was empowered to appoint not less than ten, nor more than fourteen persons, to be a board of education for the province, of whom one-half were to be protestants, and the other half catholics; also one superintendent of protestant schools and one superintendent of catholic schools, who were joint secretaries of the board.

The duties of the board were described as follows: 1st. "To make from time to time such regulations as they may think fit for the general organization of the common schools; 2nd. To select books, maps and globes to be used in the common schools, due regard being had in such selection to the choice of English books, maps and globes for the English schools, and the French for the French schools, but the authority hereby given is not to extend to the selection of books having reference to religion or morals, the selection of such being regulated by a subsequent clause of this Act; 3rd. To alter and sub-divide, with the sanction of the lieutenant governor in council, any school district established by this act."

The general board was divided into two sections, and among the duties of each section we find the following: "Each section shall have under its control and management the discipline of the schools of the section; it shall make rules and regulations for the examination, grading and licensing of teachers, and for the withdrawal

of licenses on sufficient cause; it shall prescribe such of the books to be used in the schools of the section as have reference to religion or morals."

By section 13, the monies appropriated to education by the legislature were to be divided equally, one moiety thereof to the support of protestant schools, the other moiety to the support of catholic schools.

The first board appointed by the lieutenant governor in council, was composed of the bishop of St. Boniface, the bishop of Rupert's Land, several catholic priests, several protestant clergymen of various denominations, and a couple of laymen for each section.

The said statute was amended from time to time as the country was becoming more settled, and new exigencies arose. But the same system prevailed until the act of last session, the only substantial amendments were that in 1875, the board was increased to twenty-one, twelve protestants and nine Roman catholics, and the monies voted by the legislature were to be divided between protestants and catholics in proportion to the number of children of school age in the respective protestant and catholic districts.

The more noticeable change in the system was that the denominational distinction between the catholics and protestants, and the independent working of the two sections became more and more pronounced under the different statutes afterwards passed. Section 27, of the Act of 1875, c. 27, says: "That the establishment of a school district of one denomination shall not prevent the establishment of a school district of the other denomination in the same place."

The same principle is carried out and somewhat extended by sections 39, 40 and 41, of the Act of 1876, c. 1.

In 1877, by c. 12, s. 10, it was enacted that "in no case a protestant ratepayer shall be obliged to pay for a catholic school and a catholic ratepayer for a protestant school."

So it is manifest that until the act of last session the school system created by the provincial legislature, under the provisions of the Constitutional Act, was entirely based and carried on, on the denominational principle, as divided between protestant and Roman catholic schools.

The only question, it strikes me, we are now called upon to consider is: Does this Public School Act prejudicially affect the class of persons who, in practice, enjoyed the rights and privileges of denominational schools at the time of the union? Now what were the provisions of the Public Schools Act? Mr. Justice Dubuc likewise gives a synopsis of the Public Schools Act as follows;—

"At the last session of the legislature, two acts were passed in respect of education, the first one, c. 37, abolishes the board of education heretofore existing, and the office of superintendent of education, and creates a department of education which is to consist of the executive council, or a committee thereof, appointed by the lieutenant governor in council, and also an advisory board composed of seven members, four of whom are to be appointed by the department of education, two by the teachers of the province and one by the university council. Among the duties of the advisory board is the power 'To examine and authorize text books and books of reference for the use of the pupils and school libraries; to determine the qualification of teachers and inspectors for high and public schools; to appoint examiners for the purpose of preparing examination papers; to prescribe the form of religious exercises to be used in schools.'"

The next act is, The Public Schools Act, c. 38. It repeals all former statutes relating to education. It enacts, amongst other things, as follows: Section 3, "All protestant and catholic school districts, together with all elections and appointments to office, all agreements, contracts, assessments and rate bills, heretofore duly made in relation to protestant or catholic schools, and existing when this act comes into force, shall be subject to the provisions of this act." Section 4, "The term for which each school trustee holds office at the time this act takes effect shall continue as if such term had been created by virtue of an election under this act." Section 5, "All public schools shall be free schools, and every person in rural municipalities

between the age of five and sixteen years, and in cities, towns and villages, between the age of six and sixteen, shall have the right to attend some school." Section 6, "Religious exercises in the public schools shall be conducted according to the regulations of the advisory board. The time for such religious exercises shall be just before the closing hour in the afternoon. In case the parent or guardian of any pupil notifies the teacher that he does not wish such pupil to attend such religious exercises, then such pupil shall be dismissed before such religious exercises take place." Section 7, "Religious exercises shall be held in a public school entirely at the option of the school trustees for the district, and upon receiving written authority from the trustees, it shall be the duty of the teacher to hold such religious exercises." Section 8, "The public schools shall be entirely non-sectarian, and no religious exercises shall be allowed therein except as above provided."

It provides for the formation, alteration, and union of school districts in rural municipalities, and in cities, towns or villages, the election of school trustees and for levying a rate on the taxable property in such school district for school purposes.

Section 92 enacts that "The municipal council of every city, town and village shall levy and collect upon the taxable property within the municipality in the manner provided in this act and in the municipal and assessment acts, such sum as may be required by the public school trustees for school purposes."

Section 108, which provides for the legislative grant to schools, has the following sub-section; "(3) Any school not conducted according to all the provisions of this, or any act in force for the time being, or the regulations of the department of education, or the advisory board, shall not be deemed a public school within the meaning of the law, and shall not participate in the legislative grant." By section 143, "No teacher shall use or permit to be used as text books, any books in a model or public school, except such as are authorized by the advisory board, and no portion of the legislative grant shall be paid to any school in which unauthorized books are used." By section 179, "In cases where, before the coming into force of this act, catholic school districts have been established as in the next preceding section mentioned (that is, covering the same territory as any protestant district), such catholic school district shall, upon the coming into force of this act, cease to exist, and all the assets of such catholic school district shall belong to, and all the liabilities thereof be paid by the public school district."

It is easy to see from the above that the new act makes a complete change in the system. The denominational division of catholics and protestants is entirely done away with, and by section 179, where, as in this case, a catholic school district is supposed to cover the same territory as any protestant school district, the said catholic school district is not only wiped out, but its property and assets are vested in, and belong to the other school district, which under the act becomes the public school district.

But it is said that the catholics as a class are not prejudicially affected by this act. Does it not prejudicially, that is to say injuriously, disadvantageously, which is the meaning of the word prejudicially, affect them when they are taxed to support schools of the benefit of which by their religious belief and the rules and principles of their church they cannot conscientiously avail themselves, and at the same time by compelling them to find means to support schools to which they can conscientiously send their children, or in the event of their not being able to find sufficient means to do both, be compelled to allow their children to go without either religious or secular instruction? In other words, I think the catholics were directly prejudicially affected by the legislation; but, whether directly or indirectly, the local legislature was powerless to affect them prejudicially in the matter of denominational schools, which they certainly did by practically depriving them of their denominational schools and compelling them to support schools the benefit of which protestants alone can enjoy.

In my opinion the Public Schools Act was *ultra vires* and the by-laws of the city of Winnipeg, Nos. 480 and 483, should be quashed. This appeal should be allowed with costs.

PATTERSON, J.

The statute of Canada (33 Vic., ch. 3) which gave its constitution to the province of Manitoba declares in section 22 that, in and for the province of Manitoba, the legislature "may exclusively make laws in relation to education, subject and according to the following provisions:—

"(1.) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools, which any class of persons have by law or practice at the union."

"Law" here evidently means statute law. The basis of the constitution given to the new province was the British North America Act 1867 (33 Vic., ch. 3, s. 2). It is declared that that act shall apply to the province, excepting, amongst other things, such provisions as are varied by the Manitoba Act.

Section 93 of the British North America Act, which dealt with the subject of provincial legislation respecting education, was not intended to be applied to Manitoba without some variations. It was therefore re-written to form section 22 of the Manitoba Act, the original language being adhered to whenever no variation of the provisions were intended. In this way I suppose it was that section 22 happens to refer to rights and privileges with respect to denominational schools which any class of persons had in the province by law, when there was no statute touching such schools that affected Manitoba. The reference in section 93 was to statutory rights and privileges existing in some of the provinces entering into the confederation. In section 22 it meant nothing. If that section, which is a transcript of section 93 with the interpolation of the words "or practice," had not introduced those words, it would have been inoperative for want of something to operate on. It is not an example of very precise or accurate drafting. The first question for us to decide is what the added words "or practice" mean, or whether they also mean nothing. "Which any class of persons have by law or practice"—in grammatical effect "have by law or *by* practice."

What is meant by having *by practice*?

To have *by law* here means to have under some statutory provision, the preposition "by" pointing to the law or statute as the means or instrument by which the right or privilege was acquired. Are we obliged to understand the term "by practice" as intended to signify acquired by practice or user, involving some idea of prescription? It is arguable and has in effect been argued that that is the proper understanding of the term—that the word "by" must have the same force when understood in the one place as when expressed in the other, leading to the conclusion that, inasmuch as no rights or privileges in respect of denominational schools had been acquired in the territory in that manner, the clause in question is wholly inoperative.

The construction thus contended for may be capable of being supported by strict reasoning from rules of grammar or rhetoric, but it is not in my judgment appropriate to this clause. We have seen that precision and accuracy are not characteristics of the clause as a whole, and we cannot properly single out these particular words "by practice" for very critical and pedantic treatment.

We must credit the legislature with having intended that these words, which were added to those taken from section 93, should have some effect. I take the meaning of the clause to be that rights and privileges in respect of denominational schools existing by statute, if any such there had been, and rights actually exercised in practice at the time of the union, were not to be prejudicially affected by provincial legislation.

There were denominational schools maintained by different classes of persons, some by the Roman catholic church, others by protestants. The right to establish and maintain such schools was not derived from statutory law. It was incident to the freedom of British subjects and was independent of and anterior to legislation. The Manitoba Act did not assume to preserve that right merely as an abstract and theoretical right, but it did so in favour of such classes of persons as at the union

were practically exercising it. If this construction seems to do any violence to the language of the clause it is only by treating the word "by" where it is understood before the word "practice" as not having precisely the same force as when expressed before the word "law." But as once remarked by one of the most eminent of English judges, Lord Stowell, when Sir W. Scott, "Courts are not bound to a strictness at once harsh and pedantic in the application of statutes." (The Reward, 2 Dods Adm. Rep. 269).

Dicta to the same effect, as well as examples of their application, abound in the books. Thus in a recent case, *Salmon* v. *Duncombe* (L. R. 11 App. Cas. 627), we find it laid down in the judgment of the judicial committee, that where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskillfulness or ignorance of law, except in the case of necessity or the absolute intractability of the language used.

"The more literal construction of a statute," said Lord Selborne, in *Caledonian Ry. Co.* v. *North British Ry. Co.*, (L. R. 6 App. Cas. 114), "ought not to prevail if it is opposed to the intentions of the legislature, as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated."

In my opinion, the Roman catholics are a class of persons who had, within the meaning of the statute, rights and privileges with respect to denominational schools in the province of Manitoba at the union.

The rights and privileges preserved by the statute were only those peculiar to the schools as denominational schools, or which gave the schools that character. Chiefly, they were the education of their children, under the control and direction of the church, and the maintenance of their schools for that purpose.

A point is made in the affidavit on which these proceedings are founded upon the fact that the schools of the Roman catholic church were maintained by the catholics by contributions in some form, as fees for tuition, or as contributions to the general funds of the church, or possibly, though we are not told that it was so, as subscriptions for school purposes, and the schools of the protestants were maintained by protestants, neither body contributing, or being liable to contribute, to maintain the schools of the other. The fact is not without importance from a point of view which I shall presently notice, but I am not prepared to hold that the immunity enjoyed from liability to support schools of another denomination, at a time when taxation for school purposes was unknown in the territory, was a privilege in respect of denominational schools.

The provincial statute of 1890, which is attacked as *ultra vires*, renders every taxpayer liable to assessment for the support of the public schools. These schools are not denominational, and they are objectionable to the Roman catholic church, which insists upon the supervision of the education of the children of its members. The effect of the new statute and the grounds of objection to it are explained in the affidavit of Archbishop Taché. I refer particularly to paragraphs 8, 10 and 11. Rather than countenance the public schools, he tells us in the 8th paragraph, Roman catholics will revert to the system in operation previous to the Manitoba Act, and will establish, support and maintain schools in accordance with their principles and faith. In other words, they will assert and act upon the privilege or right in respect of denominational schools which, as I construe section 22, they had as a class at the union.

It is thus in effect asserted on the part of the appellant, that the right or privilege has not been destroyed by the Public Schools Act of 1890. The same assertion is made on the part of the respondents, who make it one of their grounds in support of the by-laws which are attacked, or rather in support of the provincial statute. But the right or privilege may continue to exist and yet be injuriously affected. It is not the cancelling or annulling of the right that is forbidden. The question is, does the statute of 1890 injuriously affect the right? That it does so appears to me free from serious doubt.

In one form or another the members of the church supported the schools of the church. As a class of people they bore the burden. We are not concerned to inquire how the burden was distributed among the individual members, or whether each one bore some part of it. The privilege in question appertained to the class of people, and the burden was borne by the class. The bearing of the burden was essential to the enjoyment of the privilege. It is the maintenance of a school that is of value to the community or class rather than the abstract or theoretical right to maintain it. In other words, the value of the right depends upon the practical use that can be made of it. Whatever throws an obstacle in the way of that practical use prejudicially affects the right. It is not conceivable that in any community, and notably among the settlers in a region like Manitoba, a burden of taxation for the support of public schools can be imposed on the people of any religious denomination without rendering it less easy for the same people to maintain denominational schools. The degree of interference is immaterial. If it occurs to any extent the right to maintain the denominational school is injuriously affected.

It has been objected that the argument against the public school tax on the ground of its making the people less able to support their denominational schools involves the denial of the right to impose ordinary municipal taxes, because those taxes also absorb their share of the means of the taxpayers. The objection is aside from the issue. The provision of the statute relates only to legislation respecting education, and the restriction is upon the power to make laws on that subject.

It is not, however, merely a question of pecuniary ability to do one's share in supporting a denominational school in addition to paying the public school tax. Assuming the ability in the case of every individual belonging to the denomination, which is an extravagant assumption, we must remember that the one payment is compulsory and the other voluntary. When a man has under compulson paid his money for the support of the public school, it is natural that he should be less willing to avail himself of the privilege of paying for the support of the other, though his right to pay as well as his ability remain. The contest is over the right or privilege not of the individual, but of the class of persons.

We are familiar with the expression "injuriously affected" as used in the compensation clauses of the Railway Acts and in the English Lands Clauses Act. It would be labour lost to cite cases turning upon the applications of the provisions for compensating persons whose lands are injuriously affected by works done under sanction of law. They are very numerous, and the English cases will be found collected in Cripps on Compensation (Ch. 9) and several other treatises. The claim to compensation failed in many of the cases in which lands were injuriously affected, for the reasons arising on the statutes under which the claim was made, as *e. g.* because the injury was caused by an act that would not have given a right of action at common law, or because it was caused by the operation only, and not by the construction of the work; but all the cases agree in recognizing as something that injuriously affects a man's property whatever interferes with his convenience in the enjoyment of it or of any right in respect of it, or prevents him from enjoying it to the best advantage, and whether the injury happens to be permanent or only temporary. The same principle makes it imperative to hold that the right of a class of persons with respect to denominational schools is injuriously affected if the effect of a law passed on the subject of education is to render it more difficult or less convenient to exercise the right to the best advantage. I mean the direct effect of the law, and I regard the prejudice to the denominational school which is worked by making those to whom it looks for support pay the school tax as a direct effect of the statute. There may be indirect results by which the denominational school may suffer in its prestige or prosperity yet which cannot be taken to bring the statute under the censure of section 22. One of these, viz., the competition of the public schools is alluded to in the eleventh paragraph of his grace the archbishop's affidavit. I am not quite sure that I fully understand that paragraph. I am not sure whether the objection it indicates extends to the establishment of any schools at the public expense, or only to the assessment of Roman catholics for the support

of public schools. I shall, therefore, merely say that according to my present opinion, a public school may, by reason of superior equipment or of other advantages, compete with a denominational school to the disadvantage of the latter without thereby affording just cause for complaint.

Upon the grounds which I have thus discussed, I am of opinion that the Act of 1890 transgresses the limits of the power given by the 22nd section of the Manitoba Act, and that the assessment which the appellant is resisting is illegal.

It may not be out of place to remark, though it is scarcely necessary to do so, that there is no general prohibition of legislation which shall affect denominational schools. The prohibition relates only to the rights and privileges of classes of persons and to legislation which injuriously affects such rights. There is, therefore, room for legislative regulations on many subjects, as for example compulsory attendance of scholars, the sanitary condition of school houses, the imposition and collection of rates for the support of denominational schools, and sundry other matters which may be dealt with without interfering with the denominational characteristics of the school and which I suppose were dealt with in the statutes of the province that were repealed in 1890 to make way for the system now complained of.

I am of opinion that the appeal should be allowed and the by-laws of the city of Winnipeg Nos. 480 and 483 quashed, the appellant having his costs of the appeal and also of all proceedings in the courts below.

(*Translation.*)

FOURNIER J.

It is by means of an application to quash by-laws Nos. 480 and 483 passed by the municipal council of the city of Winnipeg that the appellant has raised in this case the important question of the constitutionality of the Act 53 Vic., ch. 38, concerning the public schools of Manitoba.

By the two by-laws passed in virtue of the new School Act and of the provisions of the Municipal Act a tax of two cents on the dollar is imposed upon the value of all property, movable and immovable, in the city of Winnipeg. The proportion of this tax appropriated to school purposes is fixed at four and one-fifth ($4\frac{1}{5}$) mills on the dollar.

The ground urged for the quashing of these bye-laws is that by them a uniform tax is imposed upon catholics and protestants alike for the support of the public schools.

This ground is presented in the following terms:—"Because by the said by-laws the amounts to be levied for school purposes for the protestant and catholic schools are united and one rate levied upon catholics and protestants alike for the whole sum."

This question was submitted to the Hon. Judge Killam who decided in favour of the constitutionality of the act and of the legality of the by-laws in question. His judgment was affirmed by the majority of the supreme court of Manitoba. It is the last mentioned judgment which is now submitted for the consideration of this court.

By this act, 53 Vic., ch. 38, the system of separate schools, catholic and protestant, which was established in conformity with the act granting a constitution to Manitoba, 33 Vic., ch. 3, was completely swept away after an existence of nineteen years.

It is material to the decision of this question to refer back to the circumstances which led to the admission of this province into the Canadian confederation. First it must be remembered that (after a rebellion which had thrown the people into a strong and fierce agitation, inflamed religious and national passions and caused the greatest disorder which rendered necessary the intervention of the federal government and which had just been pacified), it was for the purpose of establishing public peace and conciliating the people there that the federal government accorded them the constitution which they have enjoyed up to the present time.

The principle of separate schools introduced into the British North America Act by the 93rd section was also introduced into the constitution of Manitoba and was declared to be applicable to the separate schools which actually existed in the territory prior to its organization as a province. The population was then divided almost equally between catholics and protestants, and while giving to the province the power to legislate concerning education sec. 22, sub-section 1, nevertheless, adds to the restriction contained in sec. 93 of the British North America Act against prejudicially affecting in any way the rights and privileges conferred by law relative to separate schools, the further restriction that such legislation should not prejudicially affect separate schools existing by practice at the union.

It is upon this extension of the prohibition of section 93, which protected separate schools, to schools established by practice, that the legislature of Manitoba acted in introducing the principle of separate schools for protestants and catholics, in the first school act passed after its organization. For this purpose it was provided by that act that the lieutenant governor in council should have authority to nominate a board of education composed of not less than ten, and not more than fourteen persons, of whom one-half should be catholics and the other protestants, and two superintendents, one for the protestant schools and the other for the catholic schools, who should be joint secretaries of the board.

The duties of the board are defined as follows:—

1st. To make from time to time such rules as should be deemed expedient for the organization of the common schools.

2nd. To choose the books, maps and globes for the use of the common schools, taking care to choose English books, maps and globes for the English schools and French books for the French schools, but this power not to extend to the choice of books concerning religion and morality, such choice being provided for by a subsequent clause.

3rd. To change and subdivide, with the sanction of the lieutenant governor, any school district established under the act. Sub-section 12 gave to the board authority to prescribe the books relating to religion and morality for the use of the schools. Sub-section 13: The moneys appropriated by the legislature for education shall be equally divided, one-half for the support of protestant schools and the other for that of catholic schools.

The first board nominated by the lieutenant governor in council was composed of the archbishop of St. Boniface, the bishop of Rupert's Land, several catholic priests and protestant clergymen of different denominations and two lay members for each district.

The act has been amended from time to time to satisfy the new requirements necessary when the settlement of the province was being developed and the population had increased, but the system of separate schools for catholics and protestants has always been maintained. The only material changes that were contained in the Act of 1875, were, that the number of members of the board was increased to 21, 12 protestants and 9 catholics, and the sums voted by the legislature were to be divided between protestants and catholics in proportion to the number of children attending the schools in each catholic or protestant district.

Subject to these changes the system of separate schools, and the independent action of the two sections of the board, were distinctly affirmed by the subsequent legislation. Section 27 of the Act of 1875 ch. 27 provided that the establishment in a district for a school of one denomination should not prevent the establishment of a school of another denomination in the same district. This principle was extended and made a part of the system of sections 39, 40 and 41 of the Act of 1876 ch. 1.

Such was the state of affairs which had existed in relation to education since the admission of the province of Manitoba into the union. It is by virtue of the provisions of the constitutional act, confirmed by an act of the imperial parliament, that all the acts of the province establishing the system of separate schools have been passed and carried out.

Although before the union there was not, strictly speaking, any system of public education in Manitoba yet for a long time prior to that protestants and catholics

were respectively accustomed to maintain on their own account and at their own expense, schools which were, in fact, separate schools where instruction was imparted according to the principle of each denomination. In his affidavit to this effect produced in support of the grounds advanced by the appellant, the facts of which are not contested by the other side, Archbishop Taché refers to the state of affairs then existing as follows:—

"Before the act of the parliament of Canada passed in the 33rd year of the reign of her majesty queen Victoria, ch. 3, known as the Manitoba Act, and before the order in council made in virtue of that act, there existed in the territory now forming the province of Manitoba a number of effective schools for the education of children. 3. These schools were sparate schools (denominational), some being regulated and controlled by the catholic church and the others by the various protestant denominations. 4. The necessary means for the support of the catholic schools were furnished in part by school fees paid by the parents of children who attended the schools and the rest was paid by the church from contributions by its members. 5. During this period, catholics had no interest in nor control over protestant schools and protestants had no interest in nor control over catholic schools. There were no public schools in the sense of schools supported by the state. Catholics maintained the schools of their church for the benefit of catholic children and were not obliged to contribute to the support of any others. In everything pertaining to education the catholics during this period were, by usage and practice, separated from the remainder of the population and their schools were conducted in accordance with the principles and doctrines of the catholic church."

In the same affidavit the archbishop declares that the church considers the schools established under the "Public Schools Act" not proper schools for the education of catholic children and that catholic children will not attend them; that sooner than patronize these schools catholics will prefer to go back to the system in force prior to "The Manitoba Act" and that they will establish and maintain schools which will conform to the principles of their faith; that protestants approve of the system of education established by "The Public Schools Act" because they resemble in every respect the school which they maintained prior to the repeal of the former statutes which recognized the system of separate schools over which they had absolute control.

The affidavits in opposition to the motion showed that the shools existing prior to the admission of Manitoba into the union were only private schools, subject to no control on the part of the public and receiving no public subsidies; that no taxes were imposed by authority for this object and there were no legal means of compelling the public to contribute to the support of these private schools.

The affidavits produced on each side in no way contradict each other and they give a correct idea of the situation of the schools existing in the territory which now forms the province of Manitoba. Their effect is that it is clearly proved that the schools then existing, though not established by any law, were in fact and in practice separate schools (denominational schools). It is this state of affairs which has been sanctioned by section 22, sub-section 1, of the Constitutional Act of Manitoba by enacting that nothing in the laws which shall be passed by the legislature shall prejudicially affect any right or privilege conferred at the union by law or practice on any particular class of persons in the province in relation to separate schools (denominational schools).

This provision is the source of the power exercised by the legislature of Manitoba by virtue of the act 34 Vic. ch. 12 confirming and approving of the system of separate schools previously in existence. We have seen from the principal provisions of the statute above cited that the control exercised by protestants and catholics over their respective schools were preserved to them by the law and by the subsequent enactments until the passing of the acts 53 Vic. ch. 38.

In the session of 1890 the legislature passed two acts on the subject of education; The first, ch. 37, abolished the board of education formerly existing as well as the office of superintendent of education and created a department of education formed

of the executive or of a committee taken from its members nominated by the governor in council and of a board of advisers composed of seven members, of whom four were to be nominated by the department of education, two by the teachers of the province and one by the council of the university. Among their other duties the board of advisers had power to choose and prescribe text books and books of reference for the use of schools and school libraries, to define the qualifications of teachers and inspectors of schools; to name the persons who should prepare examination papers; to prescribe the form of religious exercises which should be used in the schools.

The other act is "The Public School Act," ch. 38, the constitutionality of which is attacked. It revokes all statutes in force concerning education and declares, by sec. 3, that all school districts, protestant and catholic, and also the elections and nominations to every office, the contracts and assessments heretofore made with respect to catholic and protestant schools and in existence at the time of its coming into force should be subject to the provisions of the present act. Sec. 4 continues in office the trustees existing at the time of its coming into force as if they had been appointed under the provisions of the act. Sec. 5: All public schools shall be free, and all children from 5 to 16 years of age in rural municipalities, and from 6 to 16 years of age in cities shall have the right to attend them. Sec. 6: The religious exercises in the public schools shall be conducted in accordance with the regulations of the board of advisers. The time for these exercises is fixed and if parents don't wish their children to take part in them the latter shall be dismissed before these exercises begin. By sec. 7, the use of religious exercises is at the option of the school trustees for the district and upon receipt of authority in writing from the said trustees the teachers will be obliged to hold these religious exercises. The public schools will not be sectarian and no religious exercises will be permitted except in the manner above prescribed.

The act provided for the establishment of school districts in the rural municipalities and in the cities and towns, for the election of school trustees and the imposition of taxes for school purposes.

Sec. 92 declares "that the municipal council of every city, town or village shall levy and collect upon all taxable property within the limits of the municipality, in the manner prescribed in the act, and in the municipal and assessment act, such sums as shall be required by the trustees for school purposes." Sec. 108 contains, on the subject of the legislative grant for schools, the following provision: (*a.*) "Every school which shall not be conducted in conformity with the provisions of this act or of any other act then in force, or in conformity with the regulations of the department of education or the board of advisers, will not be considered a public school according to law and will receive no portion of the legislative grant." Sec. 143 directs that "teachers shall not use any other school books than those authorized by the board of advisers and no part of the legislative grant will be paid to schools using unauthorized books." By sec. 179: "In cases where, before the coming into force of this act, catholic school districts have been established such as are mentioned in the preceding section, that is, covering the same territory as a protestant district, such catholic school district, from the time of this act coming in force, shall cease to exist and all the property of such district, with its liabilities, shall belong to the public school district."

These provisions taken together have produced a complete change in the system of education; the statute has swept away not only the clauses of the former law establishing separate schools but has even forbidden the use of the terms "catholic and protestant denominations." Sec. 179 in cases where catholic school district covers the same territory as a protestant district, goes the length of confiscating the property of the catholic district and handing it over to the protestant district designated by the name of public school.

By this analysis of the principal provisions of the act 53 Vic. ch. 38, it will seen that the legislature of Manitoba, having first established in conformity with the power given to it by its constitution a system of separate schools, has completely

abolished the system and organized another directly opposed to it by which it sweeps away the right to separate schools such as had existed up to that time, substituting for it another, founded after the non-sectarian principle excluding religious instruction from the schools and allowing the school trustees to choose the books relating to religion and morality which shall be used in the schools.

The system thus established is altogether opposed to the religious ideas of catholics and to the doctrines of the Roman catholic church and takes away from them the right recognized by the Manitoba Act to have separate schools.

Is not this legislation beyond the power of the legislature? Is it not directly opposed to sec. 22 of the Manitoba Act and therefore *ultra vires?*

Section 93 of the British North America Act, which gives to the provincial legislatures authority to legislate on the subject of education, contains the following restriction: "Nothing in such laws shall prejudicially affect any right or privilege conferred by law before the union upon any particular class of persons in the province with respect to separate schools (denominational").

This provision was inserted in the first sub-section of section 22 of the Manitoba Act with the single alteration of the addition of the words "or practice" after the words "by law," so that this section now reads as follows:—"Nothing in such laws shall prejudicially affect any right or privilege conferred before the union by law or practice upon any particular class of persons in the province with respect to separate schools (denominational schools)."

The solution of this question, then, rests altogether upon the interpretation to be given to the words "or by practice" introduced into section 22 and which are not found in section 93 of the British North America Act. Evidently the addition of these words was not made without design, and their signification should be ascertained by the application of the rules governing the interpretation of statutes as laid down in the books.

One of the first rules is, that when the terms of a statute are susceptible of only one meaning the court cannot inquire into the intention of the legislature according to its own ideas of what it was intended to enact. *Maxwell on Statutes.* P. 6 *Re York* v. *Midland Railway Company*, 1 E and B 858.

When the language is precise and unambiguous, but at the same time not susceptible of a reasonable interpretation and consequently the act cannot be enforced, the court has no right to give the words. on mere conjecture, a meaning which does not belong to them. *Maxwell on Statutes* p. 23. This rule is only applicable to the case where the language is precise and susceptible of only one meaning.

The words "or practice." inserted in section 22 of the Manitoba Act have not in fact a technical meaning, although in ordinary language they have a clear and unambiguous meaning. It is argued, however, that they signify that Roman catholics, although compelled to contribute to the support of public schools, may still maintain separate schools as private schools. Such a construction is very narrow and one entirely opposed to the terms of section 22. It is argued also, that they assure to them exemption from the obligation to attend the public school, but in my opinion the most liberal and sensible interpretation beyond doubt is that separate schools being, as a matter of fact, in existence at the time of the union, these words were introduced into the Manitoba Act to give them a legal existence and to prevent the local legislature from legislating to their detriment.

If the words "by practice" were susceptible of different interpretations the old rule of interpretation could be applied which declares that what might be said to be contained in the letter of the statute is not within the bounds of the act if it does not conform to the intention of the legislature (*Maxwell* p. 24) *Bacon's Abr. Statute* (1) E. It is then the intention of the legislature, which should be looked for in order to gain a correct idea of the meaning of the words "by practice." At p. 27, Maxwell says further: "To arrive at the real meaning, it is always necessary to take a broad general view of the act, so as to get an exact conception of its aim, scope and object. It is necessary, according to Lord Coke, to consider: 1. What was the law before

the act was passed; 2. What was the mischief or defect for which the law had not provided; 3. What remedy parliament has appointed; and 4. The reason of the remedy." This rule was enunciated in Heydon's case, 3 Rep. 7, decided in the reign of Queen Elizabeth, and has been followed ever since.

It is often necessary, in order to ascertain the real meaning of the words used in a statute, to go back to the history of the subject matter and examine the particular circumstances which induced the legislature to adopt the provision.

In the case of the *River Wear Commissioners* v. *Adamson* (3 App. cases) Lord Blackburn says at page 756:—

"I shall state as precisely as I can what I understand from the decided cases, to be the principles on which the courts of law act in construing instruments in writing, and a statute is an instrument in writing. In all cases the object is to see what is the intention expressed by the words used. But from the interpretation of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object appearing from the circumstances, which the person using them had in view, for the meaning of words varies according to the circumstances with respect to which they were used."

"In the interpretation of statute," says Maxwell, at p. 30, citing *Graham* v. *Bishop of Exeter*, Rep. by Moore 462, "the interpreter, in order to understand the subject matter, and the scope and object of the enactment, must, in Coke's words, ascertain what was the mischief or defect for which the law had not provided, that is, he must call to his aid all those external or historical facts which are necessary for this purpose, and which led to the enactment, and for these he may consult contemporary or other authentic works in writings."

In *Attorney General* v. *Sillam*, 2 H. & C., Lord Bramwell expressed the same view when he said at p. 529: "It may be a legitimate mode of determining the meaning of a doubtful document to place those who have to expound it in the situation of those who made it, and so, perhaps history may be referred to to show what facts existed bringing about a statute, and what matters influenced men's minds when it was made."

Similar language was used by L. J. Turner in *Hawkins* v. *Gathercole* (6 De. G., M. & G. 1). He says at pp. 20 and 21: "In construing the acts of parliament, the words which are used are not alone to be regarded. Regard must also be had to the intent and meaning of the legislature. The rule upon the subject is well expressed in the cases of *Stradling* v. *Morgan; Plawd*, 204; and also in *Eyston* v. *Studd; Plawd*, 467. In determining the question before us, we have therefore to consider not merely the words of the act of parliament, but the intent of the legislature to be collected from the cause and necessity of the act being made from a comparison of its several parts, and from foreign (meaning extraneous) circumstances, so far as they can justly be considered to throw light upon the subject."

In *Holme* v. *Guy* (5 ch. D. 905), Jessel, M. R., says: "The court is not oblivious of the history of law and legislation. Although the court is not at liberty to construe an act of parliament by the motives which influenced the legislature, yet when the history of law and legislation tells the court what the object of the legislature was, the court is to see whether the terms of the section are such as fairly to carry out that object and no other, and to read the section with a view to finding out what it means, and with a view of extending it to something that was not intended."

To establish the real meaning of the words "or by practice" these authorities justify us in examining the circumstances under which, and the object for which, these words were introduced into the act.

The 93rd section of the British North America Act gives to the legislature of each province the exclusive power to make laws concerning education, subject, however, to certain restrictions, the first of which is that nothing in those laws shall prejudicially affect any right or privilege which any class of persons has by law. Sub-section 1 of the 22nd section of the Manitoba Act adds to this prohibition that

of prejudicing the rights conferred *by practice* on any class of persons as well as those conferred by law.

What was the reason of the introduction of this restriction into sec. 93, and with what intention was it extended to rights and privileges which rested only upon practice in Manitoba at the time of the passing of the act 33 Vic., ch. 3?

When the provinces of Ontario, Quebec, Nova Scotia and New Brunswick were united each had a complete system of public schools established by law. In Ontario and Quebec the law recognized, in favour of minorities of a different creed from that of the majority, the right to have separate schools. In establishing these schools the minorities were relieved from contributing to the support of the public schools and were entitled to a proportionate share of the legislative grant.

In Upper Canada (Ont.) the question of separate schools had formed the subject of active and fierce struggles between protestants and catholics, but it was eventually set at rest by the School Act of 1863, which re-established peace and harmony in the province.

In Nova Scotia and New Brunswick there was a different state of affairs; although, as a matter of fact, the catholics there had their own schools under the law relating to common or parish schools, yet these schools were not recognized as separate schools, and the catholics had no right or privilege by law in that respect.

The authors of confederation, in order to avoid a renewal of the disturbance which had existed over this matter in the old province of Canada between catholics and protestants, while recognizing in the provinces the sole right to legislate with respect to education, wisely adopted provisions for the protection of the rights and privileges of minorities by prohibiting all legislation which would work injury to the rights and privileges existing with respect to education.

This restriction was to be applied to every new province subsequently coming into the union as well as to those which originally formed part of it.

A question concerning the extent of this restriction was raised in New Brunswick. The law in force on this subject at the date of the confederation was the Parish Schools Act of 1858. In 1871 the legislature passed an act in respect to common schools to which the catholics made strong objections. Petitions were sent to the legislature and to the parliament of Canada to prevent it coming into force. Eventually the matter was brought before the supreme court of New Brunswick, and that court, in a very elaborate judgment delivered by Sir W. J. Ritchie, then chief justice of the supreme court of New Brunswick, decided that the catholics of New Brunswick had not by law, at the time of confederation, any right or privilege with respect to separate schools. In the course of his observations the hon. chief justice thus expresses himself: "Where is there anything that can, with propriety, be termed a legal right? Surely the legislature must have intended to deal with legal rights and privileges. How is it to be defined? How enforced?" And further on: "If the Roman catholics had no legal rights, as a class, to claim any control over, or to insist that the doctrines of their church should be taught in all or any schools under the Parish Schools Act, how can it be said (though as a matter of fact such doctrines may have been taught in a number of such schools) that, as a class of persons they have been prejudicially affected in any legal right or privilege with respect to 'denominational schools,' construing these words in their ordinary meaning, because under the Common Schools Act of 1871 it is provided that the schools shall be non-sectarian?"

This decision was afterwards affirmed by the privy council. It is easy to see, by the reasons given in support of this decision and by the importance attached to the expression "legal rights," that if the rights which the catholics had *by practice* had been specially mentioned, as well as those existing by law, the decision would have been different.

Mr. Ewart, counsel for the appellant, having remarked that the words "by practice" were introduced into the Manitoba Act to avoid the difficulties which had arisen in New Brunswick, the attorney-general, counsel for respondent, stated that the School Act of New Brunswick was passed in 1871, a year after the Manitoba Act

was passed, but he should have added that the proposed law had been for some time before the legislature and the public, and had been made the subject of very vigorous debates. The hon. Geo. E. King had introduced this measure for the first time in 1869 and a second time on 24th February, 1870, when it was referred to a committee of the whole house and discussed on 17th, 22nd and 31st March and 1st April. The act did not come into force until a year after it was passed.

The Manitoba Act, passed by the parliament of Canada, became law on 12th May, 1870, more than one month after the Schools Act of New Brunswick was discussed, and more than a year after the first introduction of that act into the legislature.

Would it be at all extraordinary if the discussion which had taken place upon this subject at various times, had been published, publicly commented upon and had come to the knowledge of the members of the government of Canada and of the house of commons?

It is certain that the disturbance produced by this bill invaded the commons, and it was, no doubt, for the purpose of preventing a renewal of such disturbance that the words "by practice" were added in the 22nd section of the Manitoba Act.

The existence of separate schools in the territory of Manitoba before the organization of the province, was well known, as well as the fact that no law existed to protect catholic minorities or those of protestants who might wish to preserve their separate schools. These facts, it may be presumed, were known to the legislators. As there was, then, no law in existence with respect to separate schools, nor any other kind of schools, the first sub-section of section 93 of the British North America Act, or its introduction into the Manitoba Act, would have been of no avail. The catholics of that province would have found themselves in a worse position more than that in New Brunswick, for there, at all events, as was stated in the judgment in Renaud's case, the catholics, though without rights established by law, could, however, have had their doctrines taught in the existing schools.

The framers of the Manitoba Act seem to have been impressed by this state of affairs and it was, no doubt, to remedy it that they inserted in sec. 22 the words "by practice" which are not found in sec. 93, for the purpose of afterwards securing to catholic or protestant minorities the right to separate schools which they then enjoyed by practice. The legislature of Manitoba so thoroughly appreciated the intention of the federal parliament in introducing the words "by practice" into the Manitoba Act that by its first statute with respect to schools, it established a complete system of separate schools, catholic and protestant, which has existed for nineteen years. Its interpretation of the words "by practice" is in accordance with the spirit of the legislation and the rules of interpretation.

If clause 22 had only contained the terms of sub-section 1 of sec. 93 it would not have protected the rights of the minorities, because the terms "rights and privileges *by law*" would not have been applicable to the state of affairs existing in Manitoba where separate schools had no legal existence though they had been established for a long time *by practice and usage.*

The addition of the terms "by practice" was essential to meet the case which it was desired to provide for.

If it is a fact that these words have no technical meaning it is none the less a fact that under the circumstances in which they were used they have a clear and precise meaning and exactly cover the idea which it was intended to express of a matter which, though having no sanction *by law* yet existed in fact *by usage*, and the *custom* of the country. It is expressed in ordinary language and should be construed by its ordinary and popular meaning. The terms "by law" and "by practice" evidently signify different things and the addition of the words "by practice" makes it clear that the legislature intended to extend the restriction so as to make it applicable to the peculiar condition of the province. These words have not been placed there inadvertently and without purpose. The position of the separate schools existing in fact was made known to the framers of the act at all events by the delegates sent to regulate the terms of admission of the province into confederation.

The question, no doubt, was thoroughly discussed and it was for the purpose of finally settling it that the words "by practice" were added in sec. 22 in order to prohibit all legislation to their prejudice.

It would be absurd to say that the privilege guaranteed to catholics by the words "by practice" could be satisfied by allowing them to have separate schools in the shape of private schools carried on at their own expense. As such privilege exists at common law no legislation would be required to secure it and the expression "by practice" would then be entirely abortive and without meaning. While the federal parliament knew of the existence in the territory of separate schools, and that there was no law authorizing them and was willing to secure to them a legal existence after the union, it also knew that the provisions of the British North America Act alone were not sufficient for that object. It is, no doubt, for this reason that sec. 93 was modified by the addition of the words "by practice."

This, then, is a provision which, so far from having no meaning, has been wisely inserted to supply an important omission which would have existed at the organization of the province.

We may here then apply the rule which directs that when the language of an act is susceptible of two meanings, one of which would be absurd and the other reasonable and salutary in its effect, the latter should be adopted as being in accord with the intention of the legislature.

In the case of the *Queen* v. *Monk* (2 Q. B. D. 555). Brett, L. J., says: "When a statute is capable of two constructions one of which will work a manifest injustice, and the other will work no injustice, you are to assume that the legislature intended that which would work no injustice." Lord Blackburn expresses the same opinion in the case of *Rothes* v. *Kirkcally Waterworks Commissioners*, 7 appeal cases, 702, when he says; "I quite agree that no court is entitled to depart from the intention of the legislature as appearing from the words of the act, because it is thought unreasonable, but when two constructions are open, the court may adopt the more reasonable of the two."

It is easy to see which of these two constructions is the more just and reasonable. If the construction put upon the words "by practice" was not sufficient to give them a right to maintain their separate schools, catholics would be taxed for schools which they could not attend and of which protestants would have the sole benefit, while, on the contrary, by giving the words "by practice" their true construction, catholic schools will be recognized by law. These words "by practice" have, beyond doubt, been introduced into the Manitoba Act to secure to those who desired it the right to maintain their separate schools and to give them the sanction of law.

These reasons seem to me sufficient to prove that the act in question constitutes a clear contravention of the provisions of sec. 22, sub-section 1 of the Manitoba Act which forbids all legislation calculated to prejudicially affect separate schools.

There is another rule of construction which directs that in order to correctly interpret a statute it should be considered as a whole and its various provisions compared one with another so as to ascertain its true spirit. The Manitoba Act does not deal with the subject of separate schools in sec. 22 only; there are, indeed, a number of other provisions on this subject taken in part from sec. 92 of the British North America Act, the object of which evidently is to protect the exercise of the right to separate schools by the first section.

Sub-section 2 allows an appeal to the governor general in council from every act or decision of any provincial authority affecting any of the rights or privileges of the protestant or Roman catholic minorities of her majesty's subjects, relative to education.

Sub-section 3: In case any such provincial law as from time to time seems to the governor general in council requisite for the execution of the provisions of this section is not made, or in case any decision of the governor general in council upon any appeal under this section is not duly executed by the proper provincial authority, then, and in every such case, and so far only as the circumstances of each case

shall require, the parliament of Canada shall have power to pass remedial laws for the due execution of the provisions of this section, as well as of any decision of the governor general in council under the authority of this same section.

Sub-section 1, in speaking of separate schools, provides that no prejudices shall be worked to a right or privilege existing by law *or practice* on the subject of these schools, the second gives a right of appeal from every act or decision of the legislature or any other provincial authority calculated to affect the rights or privileges of catholic or protestant minorities on the subject of education. If these minorities have any rights or privileges on the subject of education they are, beyond doubt, those which relate to their separate schools. It is certain, then, that they have rights and privileges on this subject since the law gives a right of appeal to protect them against every injury which operates to their prejudice. Why should an appeal have been given to them if they have no right with respect to separate schools? Is it not, on the contrary, because they were already in possession of this right, by practice, that parliament has given it the sanction of law by this provision in order to protect them against every injury by the legislature or any other provincial authority?

The construction given to the words "by practice" is, therefore, found to be confirmed by the other provisions of section 22 so as to leave no doubt as to their meaning.

I am therefore of opinion that the act 53 Vic., ch. 38 (Man.) with respect to public schools is *ultra vires* and that the two by-laws passed by authority of that act are illegal and ought to be set aside and the appeal allowed with costs.

TASCHEREAU J.

(*Translated*)

The appellant by the proceedings taken in this case attacks the constitutionality of the Public School Act passed by the legislature of the province of Manitoba in 1890. The proceedings taken before the provincial courts and the manner in which the question has been submitted to us have already been referred to at length by my learned colleagues who have just given their opinion, and it would be a waste of time to repeat them. The question of law itself is narrowed down to a small compass, for the respondent and the attorney general of the province in their factum and in their argument before this court, as well as the learned judges of the court below, concede that the catholics of the province are not, and could not be, deprived, by the act in question, of the right which they always had to have separate schools and could not be obliged to send their children to the public schools. It is purely on the provisions of the statute which impose upon the catholics a tax for the support of the public schools that there in any controversy.

Section 22 of the Act of 1870, constituting the province of Manitoba, reads as follows in the French version, which it must not be forgotten is the law as well as the English version:—

"In the province the legislature may exclusively make laws in relation to education, subject and according to the following provisions: nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons may have by law or practice (*ou par la coutume*)." These are precisely the words used in the 93rd section of the British North America Act, with the simple addition of the words "or practice" (*ou par la coutume*).

It must therefore be the *rights* and *privileges* that the catholics of that part of the country enjoyed *by custom* at the time of the union in reference to the denominational schools (for there were none *by law* on the subject-matter) which cannot be interfered with by the legislature, the power of the legislature in the matter of education being subject to the above restriction. This could not be controverted, and the learned attorney general of the province has become a party to the appeal

in this case only to contend that the statute, passed by the legislature, although enacting that the appellant (and with him all the catholics of the province) is bound to contribute his share of the tax imposed for the support of the public schools, does not in any wise prejudice *any right or privilege* which they enjoyed *by custom.* It is necessary, therefore, to first ascertain what evidence there is in the case in reference to such custom or practice in that part of the North-West Territories prior to the union. His grace the archbishop of St. Boniface in an affidavit filed in the proceedings by the appellant described it as follows:—

"Prior to the passage of the act of the dominion of Canada, passed in the 33rd years of the reign of her majesty queen Victoria, chapter 3, known as the 'Manitoba Act,' and prior to the order in council issued in pursuance thereof, there existed in the territory now constituting the province of Manitoba a number of effective schools for children. These schools were denominational schools, some of them regulated and controlled by the Roman catholic church, and others by various protestant denominations.

"The means necessary for the support of the Roman catholic schools were supplied to some extent by school fees paid by some of the parents of the children who attended the schools, and the rest was paid out of the funds of the church, contributed by its members.

"During the period referred to, Roman catholics had no interest in or control over the schools of the protestant denominations, and the members of the protestant denominations had no interest in or control over the schools of the Roman catholics. There were no public schools in the sense of state schools. The members of the Roman catholic church supported the schools of their own church for the benefit of the Roman catholic children, and were not under obligation to, and did not contribute to the support of any other school.

"In the matter of education, therefore, during the period referred to, Roman catholics were, as a matter of custom by practice, separate from the rest of the community, and their schools were all conducted according to the distinctive views and beliefs of Roman catholics as herein set forth.

"Roman catholic schools have always formed an integral part of the work of the Roman catholic church. That church has always considered the education of the children of Roman catholic parents as coming peculiarly within its jurisdiction. The school, in the view of the Roman catholics, is in a large measure the 'children's church,' and wholly incomplete and largely abortive if religious exercises be excluded from it. The church has always insisted upon its children receiving their education in schools conducted under the supervision of the church, and upon being trained in the doctrines and faith of the church. In education, the Roman catholic church attaches very great importance to the spiritual culture of the child, and regards all education unaccompanied by instruction in its religious aspect as possibly detrimental and not beneficial to children. With this regard the church requires that all teachers of children shall not only be members of the church, but shall be thoroughly imbued with its principles and faith; shall recognize its spiritual authority and conform to its directions. It also requires that such books be used in the schools, with regard to certain subjects as shall combine religious instructions with those subjects, and this applies peculiarly to all history and philosophy."

His grace further swears that:

"The church regards the schools provided for by 'The Public School Act,' and being chapter 38 of the statutes passed in the reign of her majesty queen Victoria, in the 53rd year of her reign, as unfit for the purpose of educating their children, and the children of Roman catholic parents will not attend such schools. Rather than countenance such schools, Roman catholics will revert to the system of operation previous to the Manitoba Act, and will establish, support and maintain schools in accordance with their principles and faith as aforementioned.

"Protestants are satisfied with the system of education provided for by the said act, 'Public School Act,' and are perfectly willing to send their children to the schools established and provided for by the said act. Such schools are in fact

similar in all respects to the schools maintained by the protestants under the legislation in force immediately prior to the passing of the said act. The main and fundamental difference between protestants and catholics with reference to education, is, that while many protestants would like education to be of a more distinctly religious character than that provided for by the said act, yet they are content with that which is so provided and have no conscientious scruples against such a system, but catholics on the other hand insist and have always insisted upon education being thoroughly permeated with religious aspects. That causes and effects in science, history, philosophy and ought else should be constantly attributed to the Deity and not taught merely as causes and effects.

"The effect of 'The Public School Act' will be to establish public schools in every part of Manitoba where the population is sufficient for the purpose of a school and to supply in this manner education to children free of charge to them or their parents further than their share in common with other members of the community of the amounts levied under and by virtue of the provisions contained in the act.

"In case Roman catholics revert to the system in operation previous to the Manitoba Act, they will be brought in direct competition with the said public schools; owing to the fact that the public schools will be maintained at public expense, and the Roman catholic schools by school fees and private subscriptions, the latter will labour under serious disadvantage. They will be unable to afford inducements and benefits to children to attend such schools equal to those afforded by public schools, although they would be perfectly able to compete with any or all schools unaided by law enforced support."

John Sutherland and Alexander Polson, in the two affidavits produced by the respondent filed in answer to the petition of the appellant, also described how matters stood in the province in reference to schools prior to the union as follows:—

"That schools which existed prior to the province of Manitoba entering confederation were purely private schools, and were not in any way subject to public control nor did they in any way receive public support.

"No school taxes were collected by any authority prior to the province of Manitoba entering confederation, and there were no means by which any person could be forced by law to support any of the said private schools. I think the only public revenue of any kind then collected was the customs duty, usually 4 per cent."

The only possible conclusion of fact to be drawn from these affidavits, which form the only evidence of record on this point, is that prior to the union, the catholics residing in that territory by custom, enjoyed not only the privilege of having their schools, but also, negatively and as a correlative and an essential part of such privilege, that of not being obliged to contribute to the support of any other system of education. The fact of not being assessable for the support of other schools than their own, was the privilege which they had. The privilege alone of having their private schools would have been illusory—in fact it could not be said to be a *privilege;* the right to have private schools is a common law right. To retain a custom or practice which would have enabled them to support their own schools as well as the schools of others, would have been a singular privilege. In fact, the privilege then ought more properly to be said to belong to the class of persons whose schools would have been supported by the catholics. This, it seems to me, is in effect what the respondent says he is willing to concede now to the catholic minority in the province:—

"The statute of 1890, says the respondent, obliges, it is true, the catholics to contribute to the support of public schools, but it does not compel them to send their children to these schools, and does not prevent them either from establishing separate schools, and therefore does not prejudice any of the rights or privileges enjoyed by them by custom prior to the union, and the statute then, is *intra vires.*" Such an argument is, in my opinion, entirely erroneous. As a matter of fact I would not believe that it was seriously relied on, were it not that the provincial court has adopted it. It virtually amounts to this: to allow the majority, which is non-catholic, to say to the catholic minority "you have the privilege of having your

schools, you can retain it, provided you help to support ours; you cannot send your children to our schools, but we do not ask that you should, all we want you to do is to pay for the education of our children."

I have looked in vain through the record to come to the conclusion that this was *the custom* or *practice* prior to the union. The contrary, to my mind, is clearly proved. Can it be possible to imagine the practical existence of such a system as the one that the respondent would like to establish in Manitoba, and at the same time say that the right to have separate schools exists, a right which could not be denied under section 22 of the act constituting the province of Manitoba? It is evident that the legislature by this section, foreseeing that necessarily in the near future, one or the other of the two classes, protestants or catholics, would preponderate by its numbers in the projected province, provided for either case. At that time they were about equally divided, for if we refer to the legislation which was enacted by the new province on this subject matter, in 1871, we find that it was provided that the board of education should have an equal number of protestants and Roman catholics, with a superintendent for each class, also dividing equally between the two classes the government subsidy. It was when this was the actual state of affairs that parliament provided by section 22 for either of these eventualities. By the first sub-section which I have given at length, parliament secures to the minority, either protestant or catholic, as the case may be, the rights which they had at the time by custom (or practice) and by sub-section 2 gives a right of appeal to the governor general in council in respect to any legislation which might be made in relation to their rights on this matter. If it had happened that the protestants had been in the minority they certainly could not have been forced to contribute to the support of catholic schools. They would immediately have claimed the right to have their schools, as their co-religionists have in the province of Quebec, *the right* or *privilege* in its entirely and without prejudice, that is with the exemption of being taxed for the catholic schools. The catholics of Manitoba who are to-day in the minority claim but the same right and the free exercise of such right. I am of the opinion that their claim is well founded. They have the same right to establish their system of schools as their co-religionists have in the province of Ontario, or on the same principle.

It is with this object in view and this object alone, at least I cannot suppose any other, that the special provision in reference to denominational schools, reproduced from the British North America Act, was inserted in the act constituting the province of Manitoba, adding the words or "by custom," or "by practice," words which had become necessary, as I have already stated, to complete the idea of the legislature and to provide for its due execution, it being a well known fact that at that time there existed no law in the territory on the subject matter, and that all was regulated by custom and by practice only.

The corporation of the city of Winnipeg (respondent) and the attorney-general whilst in the abstract they are willing to recognize to the minority the right to have separate schools, yet they want to interfere with the free exercise of such right. The whole of the government grant to education is by the statute in question appropriated to the public schools or free schools; nothing is granted to the minority, sec. 108. Nevertheless this grant is taken out of the public revenue to which the minority has contributed its pro-rata proportion, and this fact is the sole basis of his grace the archbishop of St. Boniface's complaint in the 11th paragraph of his affidavit, but upon which an erroneous interpretation has been put by some. His grace does not fear for the catholic schools the competition of the public schools, if the legislature will only place them on the same footing before the law. What his grace does assert is that if it is intended to support the public schools at the cost of the state and leave the catholic schools to be supported by voluntary contributions, the latter will find themselves in a most disadvantageous position. I do not think it is necessary to add anything to demonstrate the truth of his assertion. But, not only does the statute in question, I repeat, give to the public schools the whole of the government grant but also imposes upon catholics direct taxation for their sup-

port. Nay, more, a tax is imposed for the support of the public schools not only on all private property belonging to catholics, but even on school houses and other property destined by catholics for the education of catholic children. The statute goes so far by sec. 174 as to order the confiscation in certain cases for the benefit of the public or free schools, of educational establishments belonging to the catholic minority.

I am of opinion that such legislation causes a prejudice to the *rights* and *privileges* belonging to this minority prior to the union and therefore is *ultra vires.*

The respondent in answer to the appellant's petition makes use also of the following ground of argument. "It is possible, he says, that this legislation does cause a prejudice to the rights of the minority, but nevertheless it is within the powers of the legislature of the province of Manitoba; because, for example, he continues, a municipal tax or other tax may indirectly more or less deprive catholics of the necessary funds to support their schools, yet you must submit." This reasoning cannot prevail, for it is based on something that does not exist. By section 22, of the federal act of 1870, the provincial legislature is specially prohibited from causing any prejudice to the rights of the minority, when dealing with the subject matter of education. Then again in the case of a municipal tax, the minority is on a perfect footing of equality with the majority and receives its proportionate share of what is produced by the tax; whilst in the present case the appellant contends that he is prejudicially affected by being obliged to pay for others and to contribute for the support of schools from which he receives no benefit. This is what in reality he complains of. You concede in theory his right to a system of schools but you place obstacles in the way of the exercise of the right. If the state levies, for example, $20,000, or any other amount on this minority for the support of the public schools, this virtually, it seems to me, deprives catholics of so much of their means for the support of their own schools. Now, to place obstacles to the exercise of a right, to interfere with it or obstruct it, is, in itself, evident, clearly to cause a prejudice to that right. And this is what the legislature of Manitoba could not do under the unequivocal terms of the one statute which confers upon it the power to enact laws respecting education.

I am of opinion to allow the appeal.